87-920

No. .....

In The
Supreme Court of the United States
October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

vs.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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106 pp

QUESTION PRESENTED

In the interest of assuring that only initiative measures with a significant modicum of support reach the ballot, may Colorado prohibit payment of petition circulators as long as it otherwise permits unlimited contributions and expenditures?

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Colorado Secretary of State, Natalie Meyer and the Colorado Attorney General, Duane Woodard, appeal from the judgment of the Tenth Circuit Court of Appeals, dated September 2, 1987, holding Colo. Rev. Stat. sec. 1-40-110 (1980) unconstitutional under the first and fourteenth amendments of the United States Constitution.

—o—

OPINIONS BELOW

The *en banc* opinion of the Tenth Circuit Court of Appeals, which appears in the appendix hereto App. 1, *infra* is reported at 828 F.2d 1446 (10th Cir. 1987). The decisions of the district court and the Panel decision of Tenth Circuit are reported at 741 F.2d 1210 (10th Cir. 1984). The decisions are reprinted in the appendix hereto App. 41, *infra*.

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JURISDICTION

Appellees brought this action against appellants pursuant to 28 U.S.C. sec. 1331 (1980). The judgment of the federal district court sustaining the constitutionality was entered on July 3, 1984. The judgment of the Panel of the Tenth Circuit was entered on July 31, 1984. The appellees requested a rehearing on August 10, 1984. The rehearing was granted on December 20, 1985. The *en banc* decision was entered on September 2, 1987. Appellants filed a Notice of Appeal regarding the *en banc* decision with the Tenth Circuit on October 6, 1986. An Amended Notice of Appeal was filed with the Tenth Circuit on October 23, 1986. A Notice of Appeal was also filed with the district court on October 23, 1986. No rehearing was permitted pursuant to Tenth Circuit Rule 35.6. This appeal is being docketed within 90 days from the date of the Tenth Circuit's judgment. The Supreme Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(2) (1966), which provides for appeal to the supreme court when a federal court declares a state statute to be unconstitutional.

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CONSTITUTIONAL PROVISIONS AND STATUTES

A. First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

B. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

C. Colo. Rev. Stat. sec. 1-40-110 (1980)

Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973).

STATEMENT OF THE CASE

Meyer, as Secretary of State, is charged with the administration and enforcement of the initiative and referendum laws. Section 1-40-119, C.R.S. (1980). The Attorney General has authority to institute criminal proceedings if a violation of the initiative and referendum laws has occurred. Section 1-40-119, C.R.S. (1980).

Colorado is one of 23 states to allow its citizens to place propositions on the ballot through the initiative process. (Appellants Exhibit E). Colo. Const. art. V, sec. 1; Colo. Rev. Stat. secs. 1-40-101 to 119 (1980). Under Colorado law, proponents of an initiative measure must submit the measure to the directors of the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three member title board, which prepares a title, submission clause and summary. The proponents of the measure then have 6 months to obtain the necessary signatures, which must be in an amount equal to at least 5 percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election, and to file the petition with the Secretary of State. If these requirements are met, the measure will appear on the ballot at the next general election. Colo. Rev. Stat. secs. 1-40-101 to 105 (1980 & 1986 Supp.); *Dye v. Baker*, 143 Colo. 467, 354 P.2d 498, 500 (Colo. 1960).

The petition circulators are required to sign an affidavit stating that such signature is the signature of the person whom it purports to be and, that to the best of their knowledge and belief, each person signing the petition is a registered elector. Colo. Rev. Stat. sec. 1-40-109 (1986 Supp.). Colo. Rev. Stat. sec. 1-40-110 (1980) prohibits

payment of petition circulators and establishes criminal penalties for violations of 1-40-110.

In 1984, the appellees submitted their initiative measure to the Secretary of State. The appellees wanted to pay circulators because they believed that paying circulators would enhance their chance of obtaining the requisite number of signatures. The appellees brought suit challenging the constitutionality of the prohibition against payment of petition circulators. They asked the trial court to declare unconstitutional section 1-40-110 on the ground that it violated their first amendment rights to political speech. They also asked the district court to enjoin enforcement of section 1-40-110.

At trial one appellee testified that a circulator could take more time away from his job if he were paid. (Transcript, pp. 13, 20). Another testified that he would like to be able to pay circulators so that he would have more time to devote to his work. (Transcript p. 42). A third appellee stated that paid petition circulators have more incentive to obtain signatures. (Transcript, p. 34).

The state presented evidence which showed that Colorado's signature requirement was more liberal than signature requirements in at least 14 of the 17 states that allow a constitutional amendment to be adopted through the initiative process. (Transcript, pp. 75-76). Of the 23 states that have a statewide initiative process, Colorado ranked No. 4 in the number of initiatives on the ballot in the years preceding 1969, ranked No. 2 in the years between 1969 and 1979, and ranked in the top four in the years 1980 to 1982. For the years 1978, 1980, and 1982, the percentage of petitions reaching the ballot was equal to or above the national average. (Transcript pp. 53-55).

The state also presented testimony that volunteer petition drives fare much better on election day than do paid petition drives.

The state's evidence established that paying circulators will transform a grassroots, volunteer effort into a commercialized venture, which undermines the ability of the state to determine whether there is sufficient public support to warrant the time and expense of placing the measure on the ballot. The state showed that paid circulators, in many instances, are more interested in collecting signatures than in informing citizens about the substance of the proposal. (Transcript, pp. 83, 87-88).

The trial court held that section 1-40-110 was constitutional. It concluded that the first amendment rights of the appellees were not affected and that, even if first amendment rights were implicated, the state had a compelling interest in maintaining the grassroots nature of the initiative process.

On appeal, a majority of the panel of the Tenth Circuit adopted the district court's opinion. In a dissent Judge Holloway argued that the prohibition unconstitutionally violated appellees' first amendment rights. Upon rehearing, *en banc* the Tenth Circuit reversed the district court's decision and, in a 6-2 decision, held that the prohibition unconstitutionally restricted the first amendment rights of the appellees.

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THE QUESTION IS SUBSTANTIAL

The case presents the unique and substantial question as to whether Colorado's prohibition against payment of petition circulators violates the First and Fourteenth

Amendments when the prohibition is the only limitation on the expenditure or contribution of money. This is the first case to come to this Court in which only one type of contribution or expenditure has been prohibited. Previously, this Court has addressed only broad-based limits on total contributions and expenditures.

The initiative, as a tool of direct democracy, arose during the height of the progressive movement, lasting from approximately 1898-1919. During this period distrust of big business, and particularly political organizations, was underscored by a firm belief that government should be in the hands of the people; that political bosses and machines should be overthrown; and that through reforms, democracy, liberty and rule of law would be achieved. *See* Magleby, David B., *Direct Legislation: Voting on Ballot Propositions in the United States*, Johns Hopkins University Press, 1984, pp. 21-22.

This movement toward direct democracy in the early part of the century was a western political phenomenon. South Dakota was the first state to adopt direct legislation in 1898; Oregon was the first state to adopt the initiative in 1902. Colorado adopted the initiative in 1910. Twenty-two of the twenty-six states that now have direct legislation adopted it during the progressive era (1898-1919). Since the 1970's, widespread interest in direct legislation is reflected by the number of states (21) which have considered adoption of the direct legislation process. In the 1970's and early 1980's the simplistic view of the educated enlightened voter espoused by the progressive movement became subverted by the proliferation of special interest groups who have used the initiative process to accomplish legislation favorable to their cause. *See* Magleby "*Ple-*

biscitary Democracy: The Initiative and Referendum in American Politics," National Center for Initiative Review, 27 Dec. 1983.

Prior to 1941, Colorado had no law prohibiting payment to petition circulators. As a result, petition circulators were paid to obtain signatures. The payment of circulators was challenged as inherently fraudulent in the case of *Brownlow v. Wunsch,* 103 Colo. 120, 83 P.2d 775 (1938). The Colorado Supreme Court found that payment to petition circulators was not prohibited by either statute or constitution. However, it impliedly expressed reservations about the effects of such payment on the integrity of the process. It stated:

> To the extent that the fraud charged is premised on the advertisement for circulators and the latter being paid for names procured, without reference to our views as to the ethics of such procedure, it is sufficient to say that this practice is not prohibited by either the constitution or statutes.

Id. at 782.

The Colorado Legislature has the duty to secure the purity of elections and guard against abuse of the elective franchise. Colo. Const. art. VII, sec. 11. This duty includes establishing procedures to protect the grassroots initiative petition process. *Case v. Morrison,* 118 Colo. 517, 197 P.2d 621, 623 (1948). In order to insure the integrity of the process, the Legislature, apparently in response to abuses of the sort chronicled in *Brownlow,* passed the prohibition against payment of circulators. *See* 1941 Colo. Sess. Laws 486, sec. 6.

The question presented herein contains several components which the majority decision of the Tenth Circuit failed to address properly.

1. To what extent does the historical genesis of the direct legislation movement permit the state to prohibit payment of petition circulators? The majority in the Tenth Circuit ruled that once the state adopted the initiative process, it could not prohibit the payment of petition circulators. The majority fails to acknowledge the historical purpose of the initiative and the right of the state to enhance the citizens' interest and confidence in government. *Cf. First National Bank of Boston v. Bellotti,* 435 U.S. 765, 788-89 (1978). The methods by which a state chooses to structure its electoral system are entitled to substantial deference *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 8 (1982).

It is obvious that the Colorado Legislature concluded that paying petition circulators would undermine the public's confidence in the initiative process. This concern is reasonable, given the fact that the undue influence of monied interests was the underlying catalyst for the direct legislation movement.

2. To what extent may the state regulate ballot access of initiative measures? The majority of the Tenth Circuit failed to recognize that the state has a compelling interest in effectuating a system which avoids confusion, deception and frustration of the democratic process. *See Munro v. Socialist Workers Party,* 107 S. Ct. 533, 537 (1986). In the initiative process, the state has a strong interest in requiring a significant modicum of support. The evidence in the case showed that the prohibi-

tion did not impede access to the ballot or the likelihood of success when the proposed measures reached the ballot. Of the 23 states that had a statewide initiative process at the time that this case was tried, Colorado ranked No. 4 in number of initiatives on the ballot in the years preceding 1969, ranked No. 2 in the years between 1969 and 1979, and ranked in the top four in the years 1980 to 1982. The evidence also established that for the years 1978, 1980 and 1982, the percentage of petitions reaching the ballot in Colorado was equal to or above the national average. Colorado's signature requirement for a proposed amendment to the state constitution is less stringent than the signature requirements in at least 14 of the 17 states that allow a constitutional amendment to be adopted through the initiative process. Colorado does not require signature validation by the state. Moreover, the prohibition against payment of circulators is the only limitation; advocates can spend unlimited amounts of money to advance their cause. Compare *Buckley v. Valleo,* 424 U.S. 1 (1976).

3. To what extent does payment of petition circulators constitute speech by proxy? The majority of the Tenth Circuit rejected the idea that payment of petition circulators constitutes speech by proxy. It is undisputed that the appellees were citizens who supported an initiative measure and who were contributing directly to have others express their positions for them. There can be no doubt that such payment constitutes speech by proxy which is not entitled to full first amendment protection. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 301 (1981) (Justice Marshall, concurring).

4. Does the payment of persons to circulate petitions constitute conduct or speech? The Tenth Circuit majority incorrectly held that payment is pure speech. The Supreme Court has differentiated between speech and conduct. Proscribing a course of conduct because it was initiated, evidenced or carried out by language is not an abridgement of first amendment rights. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 456 (1978). The prohibition places only an incidental restriction on the time, place and manner of expression. The prohibition does not abridge free speech because payment of petition circulators bears no reasonable relationship to the success of the petition. *Members of City Council v. Vincent,* 466 U.S. 78, 808-09 (1984). As noted, the success rate of initiative measures in Colorado is substantially higher than the rates in other states. Nothing in the record indicates that paying petition circulators is a uniquely valuable or important mode of communication.

CONCLUSION

The question presented herein is extremely important to the right of the states to regulate the direct legislation process in the United States.

The initiative election was created to insure that the voices of elector without vast resources will be heard. Historically, several states prohibited such payment. However, court decisions have destroyed the underlying rationale of the initiative process. *Grant v. Meyer,* 828 F.2d

1446, 1457-58 (10th Cir. 1987) and cases cited therein. The Tenth Circuit and other courts have silenced these voices.

For the above-stated reasons the court should note probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,	)	
Plaintiffs-Appellants,	)	No. 84-1949
v.	)	
NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,	)	
Defendants-Appellees.	)	

OPINION ON REHEARING EN BANC

(Filed September 2, 1987)

Appeal from the United States District Court
For the District of Colorado

(D.C. No. 84-JM-1207)

William C. Danks, Denver, Colorado, for Plaintiffs-Appellants

Maurice G. Knaizer, First Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

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Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA and BALDOCK, Circuit Judges

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HOLLOWAY, Chief Judge

This appeal involves the constitutionality, under the First and Fourteenth Amendments, of Colo. Rev. Stat. § 1-40-110 (1980)[1] which makes it a criminal offense[2] to pay

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[1] Colo. Rev. Stat. § 1-40-110, as enacted, provides:

> Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

This statute has been challenged on several occasions since its enactment. In *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983), the Supreme Court of Colorado held that "the language of section 1-40-110 is too broad to survive strict scrutiny" with respect to the right of initiative under the Colorado Constitution and accordingly narrowed the statute by construction to delete the word "inducement." *Id.* at 763-64. The court did not express any view on the propriety of the regulation of "consideration." *Id.* at 763.

We also note that a group of Colorado residents recently filed an action in the Colorado courts, arguing that Colo. Rev. Stat. § 1-40-110 does not apply to the circulation of a referendum seeking the repeal of a city ordinance. In the alternative, the plaintiffs argued that if the statute was applicable to their referendum, then it was in violation of their state constitutional rights to free speech, free assembly and petition, freedom of association and power of referendum. *Hermes v. City of Com-*

(Continued on following page)

any consideration for the circulation of initiative or referendum petitions.

The plaintiffs initiated a petition to amend the Colorado Constitution by removing motor carriers from the jurisdiction of the State Public Utilities Commission. In order to obtain the required number of signatures, the plaintiffs wished to pay other individuals to circulate the petitions. Plaintiffs brought suit under 42 U.S.C. § 1983

(Continued from previous page)

merce City, No. 86-CV-2203, Verified Complaint at 3-6 (D. Ct. Adams County, Colo., Sept. 17, 1986). The trial judge agreed and held that the statutory ban against payment of petition circulators is unconstitutional. *Hermes v. City of Commerce City*, No. 86-CV-2203, Reporter's Transcript at 5-7 (D. Ct. Adams County, Colo., Oct. 31, 1986). Some of the plaintiffs appealed the district judge's ruling to the Supreme Court of Colorado on December 3, 1986. *Ford v. City of Commerce City*, No. 86-SA-459 (Colo. Dec. 3, 1986) (Notice of Appeal). However, the City Council apparently voted to repeal the ordinance in question slightly more than one month later, and the defendants accordingly moved to dismiss the appeal as moot. *Ford v. City of Commerce City*, No. 86-SA-459, Motion to Dismiss Appeal or in the Alternative for an Extension of Time at 1, 2 ¶ 1 (Colo. July 15, 1987). The Supreme Court of Colorado granted the motion to dismiss the appeal on July 23, 1987. *Ford v. City of Commerce City*, No. 86-SA-459 (Colo. filed July 24, 1987).

Finally, we note that the same group of plaintiffs filed a related action in federal district court which raised similar claims based on federal constitutional law. *Hermes v. Commerce City*, No. 86-Z-1883 (D. Colo. filed Sept. 12, 1986). Although there has been no final ruling in that case, the plaintiffs have stated in their briefs to the Supreme Court of Colorado that they would ask the federal district court to dismiss the action if the state appeal was found to be moot. *Ford v. City of Commerce City*, No. 86-SA-459, Reply to Objection to Motion to Dismiss Appeal at 2 (Colo. received July 23, 1987).

[2] Violation of the statute is a class 5 felony, which is punishable by one to two years' imprisonment plus one year of parole as the "presumptive" range of penalties. Colo. Rev. Stat. § 18-1-105 (1986 cum. supp.).

(1982) claiming that the statutory prohibition against such payment violates their rights of free speech and political association. The district court rejected the constitutional claim. A divided panel of this court affirmed, adopting the opinion of the district court. 741 F.2d 1210, 1211 (10th Cir. 1984) (per curiam). We granted rehearing en banc and vacated the panel opinion. 780 F.2d 848 (10th Cir. 1985). After consideration of supplemental briefs and reargument to the court en banc, we now reverse.

I

The critical facts are not in dispute. Colorado is one of 23 states to allow its citizens to place propositions on the ballot through the initiative process. Colo. Const. art. V, § 1; Colo. Rev. Stat. § 1-40-101 et seq. (1980); *see* Defendant's Exhibit E ("Initiative Provisions by State"). Under Colorado law, sponsors of the initiative must submit their proposition to the directors of the State Legislative Council and Drafting Office for review and comment. The draft is then submitted to a three-member board,[3] which prepares a title, submission clause and summary. The proponents of the initiative then have six months to obtain the necessary signatures and file the petition with the Secretary of State.[4] If these requirements are met, the submission clause will appear on the

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[3] The three-member board consists of the Secretary of State, Attorney General, and Director of the Legislative Drafting Office. Colo. Rev. Stat. § 1-40-101(2) (1980).

[4] The petition must be "signed by registered electors in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the office of secretary of state at the preceding general election." Colo. Rev. Stat. § 1-40-105 (1986 cum. supp.).

ballot at the next general election. Colo. Rev. Stat. § 1-40-101-105 (1980 & 1986 cum. supp.); *Dye v. Baker*, 354 P.2d 498, 500 (Colo. 1960).

The plaintiffs submitted their initiative measure to the Secretary of State, and set out to obtain the required 46,737 signatures of registered voters. When the trial began the plaintiffs had slightly over one month remaining to obtain approximately 30,000 more signatures.

II

We have considered, *sua sponte*, several questions relating to the justiciability of the constitutional issue presented: (1) the desirability of abstention because of the criminal sanctions in the Colorado statute banning the payment of initiative petition circulators; (2) the question of ripeness since the plaintiffs have not yet been prosecuted for violating the Colorado statute; and (3) the possibility that the appeal is moot since the November 1984 election, which was originally in question, has already passed. We conclude that we should decide the merits of the appeal.

A.

We feel that abstention is not proper here. In opposing an injunction pending appeal, the State's memorandum cited *Younger v. Harris*, 401 U.S. 37 (1971), *inter alia*, arguing that grounds for injunctive relief against enforcement of the State criminal statute were not demonstrated. On appeal, however, the plaintiffs have omitted their prayer for injunctive relief, expressing confidence that a declaratory judgment would be respected by the defendants. We feel that there is no impediment to affording these

plaintiffs declaratory relief in order to vindicate their rights under the First and Fourteenth Amendments.[5]

B.

We also believe the dispute is ripe despite the absence of a pending criminal prosecution against any of the plaintiffs. The plaintiff class consists of five individuals and a corporation called "Coloradans for Free Enterprise, Inc." The individual plaintiffs are registered voters in Colorado and several of them testified that they wished to pay others for their time and labor in circulating the petitions. Additionally plaintiffs Grant and Hoskins have been designated as representatives of the petition to deregulate Colorado's transportation industry and plaintiff Coloradans for Free Enterprise, Inc., has supported the petition. Plaintiff's Exhibit 1.

The plaintiffs are therefore parties "against whom these criminal statutes directly operate. . . ." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). "Moreover, the State has not disavowed any intention of invoking the criminal penalty provision . . . " against these plaintiffs, *Babbitt*

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[5] In their petition for rehearing, the plaintiffs requested this court to certify the question of the statute's constitutionality to the Colorado Supreme Court. Petition for Rehearing and Suggestion for Rehearing in Banc at 1 n.1. Here, however, certification would be improper since the state statute is unambiguous, *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971), and the plaintiffs do not question the statute's validity under state law. *See* Colo. App. R. 21(a). The Supreme Court recently declined a request for certification, stating that "[i]t would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *City of Houston v. Hill*, 55 U.S.L.W. 4823, 4829 (U.S. June 15, 1987).

v. United Farm Workers National Union, 442 U.S. 289, 302 (1979), and the State here is vigorously upholding the statute in litigation with these plaintiffs. "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.' " *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Thus the positions of the parties are sufficiently adverse for us to reach the merits of plaintiffs' constitutional claim. *Wilson v. Stocker*, 819 F. 2d 943, 946-47 (10th Cir. 1987).

C.

We also believe that the appeal is not moot even though the November 1984 general election has passed, as the Court held in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978). It is well settled that an appeal is not moot if the dispute is "capable of repetition, yet evading review." *See, e.g., Press-Enterprise Co. v. Superior Court*, 54 U.S.L.W. 4869, 4871 (U.S. June 30, 1986); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Under such a rationale two requirements must be met. First, the duration of the challenged action must be too short for completion of litigation prior to its cessation or expiration. Second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

These requirements are satisfied here. First, Colorado law requires proponents of an initiative to obtain a

substantial number of signatures within a six-month period. Even if a proponent could obtain a favorable ruling within that time, he would likely be unable to take advantage of his victory by using paid circulators to obtain the necessary signatures. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 774 (1978). Second, Colorado continues to prohibit the payment of circulators and the initiative to deregulate Colorado's transportation industry apparently has not yet been enacted. As a result we can reasonably expect that the same dispute will erupt again between the parties. *See id.* at 774-75; *Mandel v. Bradley,* 432 U.S. 173, 175 n.1 (1977) (per curiam).

For these reasons we turn to the merits of plaintiffs' constitutional claim.

III

A.

As noted, the district court rejected the plaintiffs' claim on the merits, finding that the statute does not impose a burden on their right to free speech. The court stated that plaintiffs are not restricted in the personal communication of their belief in the proposition; that their ability to spend money on every other form of thought dissemination is totally unfettered; and that the statute only restricts generalized support for political thought, much as the contribution of money was regarded in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). The court also "[took] seriously" the State's interests sought to be achieved by the statute—(1) protecting the integrity of the initiative process, and (2) insuring a broad base of support for any initiated measure.

As to the first asserted state interest, the court found that the testimony lends credence to the State's contentions that paid circulators would be persuaded to use sales techniques, not inherently illegal, just to enhance their own compensation. The court also referred to testimony about an incident in Florida where circulators padded petitions with names taken from a telephone book and cited evidence that no effort is made in Colorado to verify the validity of signatures except on the filing of written objections.

With respect to the second asserted state interest, the district court pointed to evidence of the history of the initiative process as supporting the State's contention that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. Specifically, the court pointed out that the initiative process originated in the West as a "grassroots" means of protecting citizens from overpowering special interest groups, and that this process is relatively rigid in practice in that once the measure is submitted to State officers for review and presented to the public, it cannot be changed.

We are convinced that the district court's views cannot be reconciled with the Supreme Court's recent decisions. For example, in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), the Court addressed the constitutionality of limitations on campaign contributions and expenditures imposed by the Federal Election Campaign Act of 1971, as amended in 1974. Pub. L. No. 92-225, § 608, 86 Stat. 3, 9 (1971) *amended by* Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1974). The Court held that the limits on contributions did not violate the contributors' First Amend-

ment rights of free speech or political association. *Id.* at 58.[6] In doing so, the Court conceded that the statute restricted the quantity of expression available to political contributors, but concluded that the restrictions were justified by the "weighty interests" of limiting the actuality and appearance of corruption resulting from large individual financial contributions. 424 U.S. at 23-38.

However, the Court invalidated various limitations on expenditures, such as the prohibition against individuals or groups spending more than $1000 per year on behalf of a political candidate. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(e)(1), 88 Stat. 1263, 1265; *see Buckley,* 424 U.S. at 58.[7] Stressing that expenditures for candidates are "permeated by First Amendment interests," the Court found that the Government's asserted interests in preventing the actuality or appearance of corruption were inadequate to justify the ceilings on independent expenditures. *Id.* at 39-51. The Court explained:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political

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[6] These limitations included, *inter alia,* a maximum of $1000 on contributions by individuals and groups to candidates and authorized campaign committees, a $5000 limitation on campaign contributions by political committees, and a $25,000 limitation on total contributions by an individual during a calendar year. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(1), (2), & (3), 88 Stat. 1263, 1263.

[7] The Court in *Buckley* also invalidated limitations on the amount a candidate could spend from his personal or family funds, and limitations on overall campaign expenditures by candidates seeking nomination or election for federal office. 424 U.S. at 51-58.

> speech . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."

Id. at 39 (quoting *Williams v. Rhodes,* 393 U.S. 23, 32 (1968)).

Since 1976 the Court has relied on *Buckley* as authority for the general rule that limits on political expression are contrary to the First Amendment. For example, the Court recently cited on *Buckley* for the proposition "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480, 496-97 (1985). To date the Court has found these governmental interests sufficient to survive exacting scrutiny only when the statute restricts political contributions to a candidate. For example, in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California,* 454 U.S. 290 (1981), the Court invalidated a city ordinance that limited contributions to committees formed to support or oppose ballot measures, banning any contribution which would cause the total amount contributed by the person to exceed $250. Distinguishing *Buckley,* the Court stated:

> *Buckley* identified a narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . . Federal Courts of Appeals have recog-

> nized that *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*

Id. at 296-97 (emphasis in original).

In discussing the ordinance's impermissible restraint on freedom of expression, the Court noted that by limiting contributions the ordinance "automatically affects expenditures" and that "limits on expenditures operate as a direct restraint on freedom of expression" of groups engaging in ballot measure campaigns. *Id.* at 299. Distinguishing candidate and ballot measure campaigns, the Court emphatically concluded that "*there is no significant state or public interest in curtailing debate and discussion of a ballot measure.*" *Id.* (emphasis added). The Court reasoned that the integrity of the political system could be adequately protected by alternative means such as public disclosure or a prohibition against anonymous contributions. The Court also pointed out that freedom of association is diluted if it does not include the right to pool money through contributions because funds are essential to effective advocacy. *Id.* at 296. The ordinance was held invalid as a restraint on both the right of association and of expression protected by the First Amendment. *Id.* at 299-300.

The distinction between the State's interests in regulating campaigns for candidates and for ballot measures was also discussed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). There the Court struck down a state criminal statute prohibiting corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted

to the voters, other than one materially affecting any of the property, business or assets of the corporation." As noted by the Ninth Circuit in *C & C Plywood Corp. v. Hanson,* 583 F.2d 421, 424-25 (9th Cir. 1978), *Bellotti* made no distinction between contributions and expenditures in deciding that the statute was unconstitutional; however, it did draw a clear distinction between ballot issues and partisan elections. The Court observed that:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." . . . We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . "

Bellotti, 435 U.S. at 790-91 (footnote and citations omitted); *see also Let's Help Florida v. McCrary,* 621 F.2d 195, 197, 199-201 (5th Cir. 1980) (invalidating Florida statute that restricted size of contributions to any political committee in support of, or opposition to, ballot issues); *C & C Plywood Corp. v. Hanson,* 583 F.2d at 424-25 (invalidating Montana law that prohibited corporations from making contributions in support of, or opposition to, ballot issues); *Schwartz v. Romnes,* 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute that prohibited corporate contributions for political purposes must be construed nar-

rowly under First Amendment so that corporations may contribute to referendum campaign).

The clear import of the decisions of the Supreme Court is that restraints on political association and communication, imposed by restrictions on financing of campaigns for ballot measures, are suspect and subject to strict scrutiny. Coloradans for Free Enterprise, Inc., and the individual plaintiffs are barred from reaching out through paid solicitors to contact more of the public. When examined with the exacting scrutiny which the Court's decisions demand, the Colorado ban on compensation of solicitors, as applied to these proponents of the initiative measure, fails since all of the interests which the State suggests in defense of this prohibition are or can be protected by less intrusive measures.

B.

As noted, the district court concluded that the Colorado statute does not impose a burden on plaintiffs' right to free speech because they could still personally communicate their belief in the proposition.[8] We think this reasoning cannot be reconciled with *Buckley* and the testimony at trial. The record evidence shows without dispute

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[8] The district court also considered the availability of other channels of communication in its analysis. This factor only becomes relevant in measuring the reasonableness of time, place, and manner regulations. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The statute's ban on the payment of circulators, however, which so directly and substantially restricts plaintiffs' right to political speech, cannot be fairly characterized in those terms. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

that a petition circulator, in obtaining signatures to a petition, engages in the communication of political ideas. The circulator approaches a stranger, asks him if he is a registered voter, and, if the person is willing to listen, advances arguments why the petition should be placed on the ballot.[9]

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[9] Paul Grant, one of the plaintiffs, gave the following testimony based on his experience as a petition circulator:

> [T]he way that we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them, "Are you a registered voter?"
>
> Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"
>
> If you get a yes, then you tell the purpose your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.
>
> Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign. If they don't, you say, "Thanks, have a nice day."
>
> * * *
>
> [We] [t]ried to explain the not just deregulation in this industry, that it would free up the industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

(Continued on following page)

See II R. 10-12, 43. This process of soliciting signatures is therefore closely intertwined with a discussion of the merits of the measure. *See Ficker v. Montgomery County Board of Elections,* No. R-85-4365, slip op. at 3-4 (D. Md. Dec. 23, 1985); *Clean-Up '84 v. Heinrich,* 590 F. Supp. 928, 930 (M.D. Fla. 1984); *Libertarian Party of Oregon v. Paulus,* Civ. No. 82-521FR, slip op. at 4 (D. Ore. Sept. 3, 1982); *Hardie v. Fong Eu,* 556 P.2d 301, 303 (Cal. 1976), *cert. denied,* 430 U.S. 969 (1977); *cf. Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947, 959 (1984) (relying on *Village of Schaumburg v. Citizens for A Better Environment,* 444 U.S. 620 (1980), for the proposition that charitable solications (sic) are so intertwined with speech that they are entitled to protection of First Amendment).[10]

(Continued from previous page)

> We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

II R. 10-11.

[10] The defendants argue that petition circulators are "election judges" whose primary duty is to assure the validity of signatures. Appellees Brief on Rehearing at 11; *see Sturdy v. Hall,* 143 S.W.2d 547, 550 (Ark. 1940). As a result, the defendants argue, any discussion of the merits of the petition is inconsistent with the circulators' governmental responsibilities.

We find the argument unconvincing. Apart from counsel's post-hoc assertions before this court, we find no evidence that the Colorado legislature intended for the solicitation process to be devoid of political advocacy. *See* P. Starr, *The Initiative and Referendum in Colorado* 9-21 (Aug. 11, 1958) (Master's Thesis) (reviewing history of Colorado's adoption of the initiative procedure). It is true that the Government has a special

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The record also establishes that the available pool of circulators will be smaller if they cannot be compensated for their work. The district court itself acknowledged that "the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." I R. 38; *see also Urevich v. Woodard,* 667 P.2d 760, 763 (Colo. 1983) ("We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."). Only a limited number of individuals can afford to devote the substantial amounts of time that may be necessary to collect signatures on a purely volunteer basis.[11] Furthermore there are practical limi-

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interest in regulating the speech of its employees, *see United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 564 (1973) (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)); but we do not think that petition circulators can be fairly characterized in this manner.

[11] Paul Grant testified:

> Money is very definitely a motivating factor to get someone to work on behalf of an effort, a matter of raising the demand and you get more supply. You pay people. You pay them more. You get more people able and willing to do it. Many of the people that I work with in the Coloradans for Free Enterprise, most of them—well, the majority of the people I work with in the Libertarian Party are people who have jobs, and they either have jobs or don't have jobs. If they do have jobs, they can't afford to take time off to work on the drive. If they don't have jobs, and they are looking for them, they can't afford to be volunteers. So money either enables people to forego leaving a job, or enables them to have a job.

II R. 19-20.

tations on the sponsors' ability to motivate volunteers because of the rejection that petitioning necessarily brings.[12]

Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. *See Ficker v. Montgomery County Board of Elections,* slip op. at 5; *Libertarian Party of Oregon v. Paulus,* slip op. at 4. In short, like the campaign expenditure limitations struck down in *Buckley,* the Colorado statute imposes a direct restriction which "necessarily reduces the quantity of expression . . . ." *Buckley,* 424 U.S. at 19.

C.

In light of the Colorado statute's restriction on plaintiffs' political expression and their efforts to communicate through petition circulators they would employ, it is incumbent on the State to show that the governmental

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[12] Lori Massie, Director of Recruitment for the ballot drive, testified:

> A petition circulator can very easily be motivated by money. If he knows he can collect money for his efforts, he is far more likely to spend six hours a day at it, than he would otherwise. The way it is right now, it is kind of a painful process to go out there and stand and ask people to sign something, and after an hour of being beaten over the head with "no's" or "drop dead" or whatever, if they were being paid and they knew that their success would relate to their pay, they would work on it. They would probably polish up their techniques also.

II R. 34.

interests suggested satisfy the exacting scrutiny given to limitations on core First Amendment rights of political expression. *See Buckley,* 424 U.S. at 44-45, 47-48. No such showing has been made here.

First, we cannot accept the district court's initial rationale for upholding the ban on payment of petition circulators—*i.e.,* protection of the integrity of the initiative process. Although the State has every right to take strong measures to prevent overreaching, improper offers of consideration for signatures, fraudulent signatures and other dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems within clearly recognized areas permitted by the Supreme Court. This is borne out by the teachings of the Court's recent opinions. Solicitation of signatures for the ballot measure "is not so inherently conducive to fraud and overreaching as to justify its prohibition." *Village of Schaumburg v. Citizens For a Better Environment,* 444 U.S. 620, 637-38 n.11 (1980). The broad intrusion banning the use of paid circulators entirely is not tailored to the least intrusive remedy, as *Buckley* and its progeny demand.

Although the State strenuously argues that it is not asserting a concern about fraud, it seems clear that the State has been compelled to attempt to avoid the Court's rejection in *Buckley* of the rationale of preventing fraud. *Buckley* held that the prevention of corruption did not constitute an interest sufficiently substantial to warrant the direct infringement of political communication represented by campaign expenditure limitations; that concern could be addressed by other measures. 424 U.S. at 45, 55-56; *cf. Secretary of State v. Joseph H. Munson Co.,*

467 U.S. at 967-68 n.16 (1984) (concerns about unscrupulous professional fundraisers or fraudulent charities not a sufficient state interest to justify prohibiting charitable organizations, in connection with fundraising activities, from paying expenses of more than 25% of amount raised; such concerns could be accommodated directly through disclosure and registration requirements and penalties for fraudulent conduct).

The State makes no showing that the Colorado General Assembly cannot effectively protect the integrity of the initiative process by laws more narrowly tailored to specific abuses. Colorado has existing statutes that make it unlawful to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo. Rev. Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition and that circulators attach an affidavit attesting, *inter alia*, to the validity of the petition's signatures. *See* Colo. Rev. Stat. § 1-40-106 (1986 cum. supp.); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide elaborate protest procedures for challenging the sufficiency of signatures on any petition, permitting both an administrative determination and an opportunity for judicial review.[13] *See* Colo. Rev. Stat. § 1-40-109 (1986 cum. supp.). Thus the State's "legiti-

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[13] For examples of judicial review of ballot measures in Colorado, see *Spelts v. Klausing*, 649 P.2d 303 (Colo. 1982); *Billings v. Buchanan*, 555 P.2d 176, 176-79 (Colo. 1976); *Case v. Morrison*, 197 P.2d 621, 621-24 (Colo. 1948); *Haraway v. Armstrong*, 36 P.2d 456, 457-58 (Colo. 1934); *Miller v. Armstrong*, 270 P. 877, 878-79 (Colo. 1928).

mate interest in presenting fraud can be better served by measures less intrusive than a direct prohibition or solicitation" by paid circulators of petitions. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 637.

The State suggests that paid petition circulators may be too persuasive, or use irrelevant arguments, in convincing persons to sign the petitions. It suffices to say that the relative merits of the method of presentation and of the ballot measure itself are for the public to weigh and consider. The First Amendment is a value-free provision whose protection is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Second, we cannot accept the State's defense of the statute based on its assertion of a compelling interest in requiring that an initiative have a wide base of public support before an initiative measure is placed on the ballot. This argument ignores the requirement in Colo. Rev. Stat. § 1-40-105 (1986 cum. supp.) that a petition be signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of Secretary of State at the previous general election. Such a requirement for petition signa-

tures, which in this case called for a minimum of 46,737 signatures of registered voters, protects the State's interest in requiring a broad case of popular support. *See* Sirico, *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 659-63 (1980) ("a legislative act or state constitutional provision presumably sets the requirement [for the number of signatures necessary to place an initiative on the ballot] sufficiently high to limit the plebescite's use to matters in which interest is sufficiently great to justify a check on the representative lawmakers"). Further, as noted above, the validity of the required number of signatures can be reviewed in State administrative and judicial proceedings questioning the signatures.

D.

There remain two further arguments made by Judge Logan's dissent which we should consider.

First, it is said that the Colorado statute's interference with First Amendment rights is minimal since the Constitution does not require states to provide their citizens with an initiative procedure. We disagree. It is true that the United States Constitution does not confer the right to use the initiative procedure. *See Kelly v. Macon-Bibb County Board of Elections*, 608 F. Supp. 1036, 1038-39 & n.1 (M.D. Ga. 1985); *Georges v. Carney*, 546 F. Supp. 469, 476 (N.D. Ill.), *aff'd*, 691 F.2d 297 (7th Cir. 1982). *But cf. Diaz v. Board of County Commissioners*, 502 F. Supp. 190, 193 (S.D. Fla. 1980) (initiative procedure is one means of preserving citizens' "unquestioned right to petition their governments for redress of what they believe are grienvances").[14] Nonetheless, we do not think that Colorado's constitutional choice to reserve the initiative for the people leaves the State free to condition its use by impermissible restraints on First Amendment activity. As one court explained: "[A]lthough the right to place a question on the ballot is not fundamental in Illinois, the legislature has seen fit to confer such right. Once Illinois decided to extend this forum, it became obligated to do so in a manner consistent with the Constitution." *Georges v. Carney*, 546 F. Supp. at 476-77. The dissent's argument fails as has the discredited rationale for rejecting Government employees' constitutional claims on the notion that there is no "constitutional right to government employment." *Slochower v. Board of Higher Education*, 350 U.S. 551, 555 (1956); *see also Barsky v. Board of Regents*, 347 U.S. 442, 473 (1954) (Douglas, J., dissenting) ("the question here is not what government must give, but rather what it may not take away").

In the same vein Judge Logan's dissent relies on the reasoning in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 54 U.S.L.W. 4956, 4961 (U.S. July 1, 1986), that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban

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[14] We note that in Colorado the right to the initiative is not a matter of legislative grace but a right reserved by the people in the State constitution. Colo. Const. art. II, §§ 1, 2 & art. V, § 1; *In re Proposed Initiative Concerning Drinking Age in Colorado*, 691 P.2d 1127, 1130 (Colo. 1984); *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983). The Colorado courts have treated the initiative as "a fundamental right at the very core of our republican form of government," and "viewed with the closest scrutiny any governmental action that has the effect of curtailing its exercise." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

advertising of casino gambling . . .'' Hence the argument is made that the power to withhold the initiative process entirely includes the power to impose the restriction on its exercise in Colorado. The references to greater and lesser powers to restrict activities ''deemed harmful'' and ''the stimulation of demand'' for them, *id.* at 4961, are not logically applicable here. The valid question raised by such reliance on *Posadas* is whether the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling. We are convinced that the answer to that question must be in the negative.

The proposition that activities ''deemed harmful'' by a state can sometimes be regulated to minimize their harmful effects without violating the First Amendment does not save the restrictive Colorado statute in question here. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding local zoning ordinances prohibiting adult theatres from being located within 1,000 feet of each other); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (upholding regulation of billboards containing commercial messages but declaring unconstitutional regulations as they related to non commercial speech). Such regulations are a far cry from restrictions on public discussion of legislative proposals concerning state regulatory policy.

In addition, *Posadas* is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely ''commercial speech which does 'no more than propose a commercial transaction . . . .' ''

Posadas, 54 U.S.L.W. at 4959 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976)). The Supreme Court has ''consistently distinguished between the constitutional protection allowed commercial as opposed to noncommercial speech.'' *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 504-05 (1981). ''The Constitution 'accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.' '' *Posadas,* 54 U.S.L.W. at 4962 (Brennan, J., dissenting) (quoting *Bolger v. Young Drug Products Corp.,* 463 U.S. 60, 64-65 (1983)). *Accord Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980). Here, by contrast, the speech at issue is ''at the core of our electoral process and of the First Amendment freedoms.'' *Buckley,* 424 U.S. at 39, 96 S.Ct. at 644 (quoting *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968)—an area of public policy where protection of robust discussion is at its zenith.

Second, Judge Logan argues in dissent that the ''speech by proxy'' doctrine makes strict scrutiny inappropriate in this case. The opinion of the district judge likewise reasoned that the contributor was paying someone else to speak and thus the contributor's speech was not restricted. 741 F.2d at 1212. We note that the Court in *Buckley* did say that ''[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.'' 424 U.S. at 21. Four members of the Court later extended this principle in upholding a $5000 limit on the amount an unincorporated association could contribute to a multicandidate political

committee. *California Medical Association v. Federal Election Commission,* 453 U.S. 182, 196-97 (1981) (plurality). However, the Court later refused to apply the "speech by proxy" concept in *Federal Election Commission v. National Conservative Political Action Committee.* 470 U.S. 480 (1985). There the Court held that a $1000 limitation on campaign expenditures by independent political committees was in violation of the First Amendment. *Id.* at 497-98. The Court gave forceful reasons for its refusal to use the "speech by proxy" analysis:

> Unlike *California Medical Assn.,* the present case involves limitations on expenditures by PACs, not on the contributions they receive; and in any event these contributions are predominantly small and thus do not raise the same concerns as the sizeable contributions involved in *California Medical Assn.*
>
> Another reason the "proxy speech" approach is not useful in this case is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id. at 495.

We think that *Federal Election Commission* compels a similar refusal to use the "speech by proxy" analysis here. It is the plaintiffs' expenditures, not contributions to them, which are limited. These expenditures advance the plaintiffs' own political expression for the ballot measure, a right of communication given constitutional protection. As the Court said in *Citizens Against Rent Control*: "Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression." 454 U.S. at 298.

Thus the reasoning of the dissent, which seeks to escape the strict scrutiny test for First Amendment restrictions, does not withstand analysis and that test must be followed as in *Bellotti* and *Citizens Against Rent Control.* And for reasons stated earlier, the Colorado restriction on First Amendment rights does not withstand strict scrutiny.

IV

We are further persuaded by the analysis of other courts which have generally struck down similar restrictions on the payment of petition circulators as violative of the First and Fourteenth Amendments.

It is true that in *State v. Conifer Enterprises, Inc.,* 508 P.2d 149 (Wash. 1973), the Washington Supreme Court held that a Washington statute prohibiting payment of petition circulators did not violate the First Amendment. However, that decision preceded *Buckley* and was based on the Washington Court's finding that while the solicitation of signatures on an initiative petition is political expression protected by the First Amendment, there is no necessary relationship between the payment of circulators and the exercise of that right. *Id.* at 153. *Buckley* rejected this theory, stating that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed,

> the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19 (footnote omitted).

In *Libertarian Party of Oregon v. Paulus*, Civ. No. 82-521FR, slip op; (D. Ore. Sept. 3, 1982), the federal district court relied on primarily on *Buckley* in striking down, on First Amendment grounds, an Oregon statute prohibiting payment to petition circulators. The court held that the statute restricted political speech because obtaining signatures on a nominating petition required the circulator to explain the candidate's views on political issues.

In *Hardie v. Fong Eu*, 556 P.2d 301 (1976), *cert. denied*, 430 U.S. 969 (1977), the California Supreme Court similarly held that a statute limiting the amount that could be spent on the circulation of petitions was unconstitutional. The court relied on *Buckley* and particularly its recognition that virtually every means of political communication in modern society requires or involves the expenditure of money. *Id.* at 303.

More recently, the federal district court for the District of Maryland invalidated a state statute like that of Colorado. *Ficker v. Montgomery County Board of Elections*, No. R-85-4365, slip op. (D. Md. Dec. 23, 1985). The court concluded that the statute restricts the discussion of ballot issues and the size of the audience that can be reached. *Id.* at 4-6. The court held that this restriction on political expression could not be justified.

The federal district court for the District of Columbia also invalidated a statute prohibiting payment to circulators of initiative petitions, reasoning that the restriction on First Amendment interests was not justified by the legislative findings or record evidence. *D.C. Committee on Legalized Gambling v. Rauh*, No. 79-3296, slip op. at 2 (D.D.C. Dec. 21, 1979).

Thus persuasive precedents since *Buckley* reject the efforts to restrict First Amendment rights by means like those employed by the Colorado statute.

V

In sum, we conclude that Colo. Rev. Stat. § 1-40-110 unconstitutionaily imposes a direct and substantial restriction on plaintiffs' right to political speech, employing unnecessarily broad prohibitions. In the area of free expression "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). We hold that the ban on payment of petition circulators in the Colorado statute violates the First and Fourteenth Amendments. Accordingly the judgment is reversed and the case is remanded to the district court for entry of an appropriate declaratory judgment.

No. 84-1949—GRANT, et al v. MEYER, et al.

BARRETT, Circuit Judge, dissenting:

I respectfuly dissent for the reasons set forth in the district court's memorandum and this court's *per curiam* opinion (Holloway, Circuit Judge, dissenting) entitled *Grant v. Meyer*, 741 F.2d 1210 (10th Cir. 1984).

I do not view the Colorado statute as a burden on First Amendment rights. Further, I believe that the statute here considered, i.e., Sect. 1-40-110 C.R.S. (1980) which

prohibits payment of initiative petition circulators, is fully justified in protecting the integrity of Colorado's initiative process.

No. 84-1949, GRANT, et al. v. MEYER, et al.

LOGAN, Circuit Judge, dissenting:

I agree that this appeal should be considered on the merits. And if I could agree with the implicit assumptions of the majority opinion in its discussion of the merits, I would be persuaded by it. But the majority treats this as a pure "speech" case, thereby invoking exacting scrutiny as the standard of review. The majority sees no distinction between restricting use of the initiative and limiting expenditures to support or oppose candidates or measures already on the ballot. The majority rejects applicability of the "speech by proxy" standard of review, and it finds Colorado's interest in denying use of paid petition circulators insufficient to uphold the legislation. I disagree with all of these assumptions and findings.

I

First, the statute at issue implicates First Amendment rights but proscribes only conduct. The statute does not prohibit citizens from spending their money in any way to express their views on a public issue on the ballot, including an initiative proposition after it has met the statutory requirements to appear on the ballot. The statute does not prohibit citizens from spending any amount of money or from associating to express their views on any public issue, including one they would like to see on an

initiative ballot. Although it does prohibit paying someone for circulating an initiative petition or for signing it, the statute in no other way prohibits anyone from paying others to espouse their views to people whom they hope will sign an initiative petition. For example, it was reported that, in the 1982 Colorado initiative to allow grocery stores to sell wine, "substantial sums [were] spent to organize and advertise a petition drive, while avoiding actual payment to circulators." The Initiative News Report, vol. IV, no. 3, at 2 (Feb. 11, 1983).

The majority treats the obtaining of signatures by paid petition circulators as inseparable from the dissemination of political ideas through such individuals. This is clearly not the case. Under the statute as written, it would be perfectly legal for plaintiff's paid representatives to "approach[ ] a stranger, ask[ ] him if he is a registered voter, and, if the person is willing to listen, advance[ ] arguments why the petition should be placed on the ballot." Slip op. at 13-14. They are simply forbidden to take the final step of obtaining the listener's signature. It is thus conduct, not speech, that Colorado seeks to regulate. " '[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Only because the majority opinion incorrectly characterizes the statute as directly restricting unalloyed political expression is it able to insist on the standard of

strict or exact scrutiny, which the majority concedes is given only to "limitations on core First Amendment rights of political expression." Slip. op. at 17.[1] The standard for speech intermingled with activity is a more flexible one. "[W]here speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles v. Preferred Communications, Inc.*, 54 U.S. L.W. 4542, 4544 (U.S. June 2, 1986).

The First Amendment forbids the government from regulating speech in ways "that favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). This statute does not violate that precept. It displays no bias against ideas or censorship. In *Members*, the Supreme Court upheld a municipal ordinance that prohibited posting signs on public property against a political candidate's claim it violated his First Amendment rights. There the Court said:

> "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.

[1] Whether the Colorado state courts have used strict scrutiny to review governmental actions affecting the initiative, as the majority opinion suggests at 21 n.14, is relevant, if correct, only to whether this statute is compatible with the *state* constitution. That question is not before us. Nor is there any question here of constitutional due process or equal protection that would warrant or at least account for the majority's invocation of employee discharge cases. The only question before us is whether this statute is incompatible with First Amendment free speech guarantees of the United States Constitution.

> . . . The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, . . . there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression."

Id. at 812 (citations and footnotes omitted). The case at bar fits that analysis.

The state has justified its limitation on paid solicitors by asserting its interest in ensuring that any initiative placed on the ballot has broad popular support.[2] As Justice

[2] The state also seeks to support the constitutionality of the legislation by arguing that petition solicitors are in a sense election judges, and unpaid volunteers are somehow more trustworthy and dependable than paid solicitors. I agree with the majority that the argument is wholly unconvincing. Neither the unpaid volunteer nor the paid solicitor is likely to violate a statute that makes it a felony to falsify signatures or otherwise breach the integrity of the petitions. An overzealous volunteer would in fact seem more likely to overstate supporting arguments for the proposition than the paid solicitor, and both are likely to use friendship or other appeals irrelevant to the merits to obtain signatures. Further, those who sign the petitions do not represent that they will vote for the proposition that is the subject of the initiative or express any opinion other than their willingness to have the proposition appear on the ballot.

White noted regarding the role of the initiative in California, it "cannot be separated from its purpose of preventing the dominance of special interests." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 311 (1981) (White, J., dissenting). The state thus has a legitimate interest in using the initiative only as a safety valve against widespread unrest, and thereby ensuring that this alternative to legislative action is used only when it has the earmarks of populist movement.

Colorado has presented empirical data which compared initiatives proposed through workers paid to circulate petitions with those proposed through volunteer solicitors. Initiatives proposed through volunteer petitioners had a much greater chance of adoption. A state exhibit indicated that the voters adopted forty-eight percent of the initiatives circulated by volunteers, whereas they adopted only twenty-four percent of those using paid solicitors. The Initiative News Report, vol. IV, no. 3, at 2 (Feb. 11, 1983). Common sense tells me the same thing: A proposition for which large numbers of volunteers come forward to solicit the necessary signatures is more likely to have widespread popular support, and hence ballot appeal, than a proposition that requires paid workers to obtain the necessary signatures. The majority's recital of what paid solicitors can do to enhance the possibility of a successful drive to put a proposition on the ballot, *see* slip op. at 14-16, only increases my conviction that if enough money is spent the original "safety valve" purposes of the initiative would be thwarted.

In a recent publication, a former General Counsel of the U.S. House of Representatives Committee on the Judiciary wrote,

> "Common Cause says if you hire the right people you can qualify anything for the ballot. In California, there are a dozen initiative-circulating consulting firms—the 'initiative industry'—that are now branching out into other states. What was originally, [sic] designed to be a volunteer or citizens' effort, which grew out of a progressive era in the West, has become a slick and professional industry."

Parker, *Washington Focus*. Trial, Aug. 1987 at 17.

The state has ample justification, in my view, for any minor encroachment on First Amendment rights that might be involved in this state enactment. *Cf. Hall v. Simcox*, 766 F.2d 1171, 1177 (7th Cir.) (state can limit access to ballot in order to fulfill its electoral purpose), *cert. denied*, 106 S. Ct. 528 (1985).

II

There is another flaw in the majority's analysis. The federal Constitution provides no individual citizen with the right to the initiative—the right to commence a procedure through which a proposed constitutional or other change in the law can be placed upon a state or federal ballot. *See Georges v. Carney*, 691 F.2d 297, 300 (7th Cir. 1982); L. Tribe, *American Constitutional Law* § 13-17 (1978). The initiative is a state-created procedure, which originated in the populist movement as a device to permit more direct citizen input. Less than half of the states provide, by constitution or statute, for this type of direct democracy.

Thus Colorado would not violate the federal Constitution if it prohibited the initiative entirely. It could deny its citizens any method, other than action through their elected representatives, to amend the state constitution or to adopt new laws. Because the state need not allow the

initiative at all, surely it can place reasonable restrictions on its use. For example, it could require, instead of a total of signatures equal to five percent of those who last voted for secretary of state, a total equal to twenty-five percent, fifty percent, or even one hundred percent of such voters. The state need only act uniformly toward all who would use the process it allowed. *Cf. Gordon v. Lance,* 403 U.S. 1 (1971) (upholding sixty percent vote requirement in referendum on incurring bond indebtedness).

Colorado has legislated in an area reserved to it—the initiative is not among the rights which the federal constitution explicitly protects—and in a manner, as discussed in part I, that only minimally interferes with First Amendment rights. Viewed from this perspective, this case seems analogous to the case recently before the Supreme Court, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 54 U.S.L.W. 4956 (U.S. July 1, 1986). There the Court upheld the validity of a Puerto Rican statute that restricted advertising aimed at residents while permitting advertising aimed at nonresidents. The Court acknowledged that it was dealing with a First Amendment issue, albeit commercial speech, but based its opinion upholding the restriction on the power of Puerto Rico to prohibit casino gambling altogether. "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* [*v. Population Services Int'l,* 431 U.S. 678 (1977)] and *Bigelow* [*v. Virginia,* 421 U.S. 809 (1975)] are hence inapposite." 54 U.S.L.W. at 4961.

There also the appellant made the related argument, like that made by the majority in the instant case, that

having chosen to permit gambling for residents the First Amendment prohibits the legislature from using restrictions that touch on speech to accomplish its goal of controlling access. The Supreme Court answered that argument as follows:

> "[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand."

Id. (emphasis in original).

I agree with the majority that a state which chooses to create a right may not take it away without providing the procedural due process guarantees of the federal Constitution. But the instant statute does not deny procedural due process. The limitation here is in the definition of the right. Suppose, for example, the statute provided that initiative petitions could not be circulated at all, but must be posted in designated public places where registered voters could come to and sign. I dare say we would not find such a law would violate First Amendment rights. I see no principled difference in the law at issue here.

III

Even if we focus exclusively on the speech component of the petition circulating activity before us here, that speech is most analogous to the "speech by proxy" achieved through contributions to a political campaign committee. Such speech is not appropriately reviewed under a strict or exacting scrutiny standard. Just as contributors to a campaign committee depend on others to espouse their political views for them, the hirers of petition circulators depend on paid circulators to decide what "pitch" to use to obtain signatures. Justice Marshall stated in *Citizens Against Rent Control*, 454 U.S. at 301:

> "this Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. As we noted last term in *California Medical Assn. v. FEC*, 453 U.S. 182, 196 (1980) (MARSHALL, J., joined by BRENNAN, WHITE, and STEVENS, JJ.), the 'speech by proxy' that is achieved through contributions to a political campaign committee 'is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.' "

(Marshall, J., concurring in the judgment).[3]

In a case challenging federal regulation of corporate and labor union solicitation practices on equal protection and First Amendment grounds, the District of Columbia Circuit stated:

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[3] Although the "speech by proxy" doctrine has never been endorsed explicitly by a majority of the Supreme Court, it continues to receive attention in Court opinions. See *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 494-95 (1985).

> "While heightened scrutiny often attends a legislative classification alleged to impinge on First Amendment interests, we reject plaintiffs' argument that the most stringent review standard should apply in this case. Decisions in point may lack perfect consistency and crystal clarity, but they do reveal that the nature and quality of the legislative action determine the intensity of judicial review of intertwined equal protection, First Amendment claims.
>
> . . .
>
> *Mosley* itself enunciated review standards that were not the most exacting, and *Buckley v. Valeo* drew distinctions bearing on the rigorousness of review based on the character of the several legislative proscriptions the Court scrutinized. . . . We are therefore confident that the matter before us does not call for a review standard more demanding than this elevated, but not strictest, test: the challenged legislative action must bear a substantial relation to an important governmental interest."
>
> *International Association of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092, 1105-06 (D.C. Cir.) (footnotes and citations omitted), *aff'd mem.*, 459 U.S. 983 (1982). Therefore, it is clear that not in all situations do First Amendment concerns require strict scrutiny. If less than strict scrutiny applies to the case before us, we must uphold the constitutional validity of the statute.

But even if we do apply strict or exacting scrutiny, *see Citizens Against Rent Control*, 454 U.S. at 298, I believe the Colorado statute should be upheld. Despite the undisputed burden that ballot restrictions in candidate cases have had on First Amendment rights, such restrictions frequently withstand strict scrutiny. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983). Most often

courts find that these limited restrictions are necessary to protect the integrity of the electoral process. *Id.* Professor Tribe explains:

> "Whatever its doctrinal roots, there is a principle to be distilled from *American Party* [*v. White*, 415 U.S. 767 (1984)] and *Storer* [*v. Brown*, 415 U.S. 724 (1974)]: in order to keep ballots manageable and protect the integrity of the electoral process, states may condition access to the ballot upon the demonstration of a 'significant, measurable quantum of community support,' but cannot require so large a demonstration of support that minority parties or independent candidates have no real chance of obtaining ballot positions . . . . In appraising the collective burden imposed by access requirements, one must place substantial weight on empirical evidence demonstrating how often minority parties and independent candidates have actually been able to satisfy them."

L. Tribe, § 13-20, at 783-84 (footnotes omitted). Just as placing too many candidates on a ballot wastes state resources and confuses voters, so does placing numerous initiatives on a ballot. *See Anderson*, 460 U.S. at 788 n.9. In my view, the state has used the least restrictive measure to achieve its justifiable goal of insuring there is widespread popular support for any initiative proposition it allows on the ballot. Therefore, I would affirm the district court's decision.

7-31-84 84-1949

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

(Filed July 31, 1984)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON and COLORADANS FOR FREE ENTERPRISES, INC.,

Plaintiffs-Appellants,

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants-Appellees.

No. 84-1949

Appeal from the United States District Court
For the District of Colorado

(D.C. No. 84-JM-1207)

William C. Danks, Denver, Colorado, for Plaintiffs-Appellants.

Ruthanne Gartland, Assistant Attorney General, Denver Colorado (Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Denver, Colorado, with her on the brief) for Defendants-Appellees.

HOLLOWAY, BARRETT and DOYLE, Circuit Judges.

PER CURIAM.

This appeal by plaintiffs-appellants involves a challenge to the constitutionality, under the First and Fourteenth Amendments, of Section 1-40-110 C.R.S. (1980), which prohibits payment of initiative petition circulators and provides criminal sanctions for violation of the statute. We consolidated consideration of a motion by plaintiffs for an injunction pending appeal with the merits, accelerated the appeal, heard argument on the merits, and have considered the briefs of the parties on the merits and the motion.

The court concludes that the judgment of the district court upholding the statute should be, and it is affirmed, and the motion for an injunction is denied. Judge Holloway dissents. The dissenting opinion is attached following the majority opinion.

Judges Barrett and Doyle have adopted the opinion of the United States District Court for the District of

Colorado filed July 3, 1984 in the captioned cause as the majority opinion of the Court. A copy of the order setting forth the opinion of United States District Judge John P. Moore is attached hereto and is incorporated herein by reference.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-1207

PAUL K. GRANT, et al.,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, et al.,

Defendants.

ORDER

(Filed July 3, 1984)

THIS MATTER is before me on a complaint seeking injunctive and declaratory relief. At issue is whether a statute of the state of Colorado prohibiting payment of persons circulating petitions proposing a constitutional amendment violates the plaintiffs' rights to free speech. Jurisdiction is asserted upon 28 U.S.C. §§ 1331 and 1343 (a)(3).

The plaintiffs in this case are interested in the adoption of an amendment to the constitution of the state of Colorado that would remove motor carriers from the jurisdiction of the state Public Utilities Commission. In accordance with provisions of the state law, they have qualified the issue for submission to the registered electors of Colorado; however, before the question can be placed upon the November ballot, the proponents must obtain signatures of 46,737 registered electors upon petitions supporting the measure. They now claim that their ability to achieve this goal would be enhanced if they could employ persons to circulate these petitions, yet they are faced with

Colo. Rev. Stat. § 1-40-110, which prohibits and makes criminal the payment of any consideration for the circulation of petitions.

Plaintiffs further claim that part of the process of obtaining the signature of electors is the communication to those persons of the merits of the issue. They indicate it is often necessary to educate and argue with potential petition signers to convince them the issue is one which should be considered by the general electorate. Thus, they believe the communication inherent in the petitioning process is political expression, hence protected speech. Upon this predicate, plaintiffs argue that Colo. Rev. Stat. § 1-40-110 inhibits their protected right because it prevents them from hiring persons to help in the dissemination of their beliefs. In support of their argument, they rely principally upon *Buckley v. Valeo,* 424 U.S. 1 (1976); *Hardie v. Fong Eu,* 556 P.2d 301 (Cal. 1976); and two unpublished United States District Court opinions from the District of Oregon and the District of Columbia. I find these cases either inapposite or unpersuasive.

Evidence taken in support of the complaint indicates the plaintiffs' accord that money is a basic motivating factor in obtaining the service of persons to carry public petitions. Each of those plaintiffs who testified indicated that payment for their own time spent in circulating petitions would be welcome, and payment of others to take their places on the hustings would free them for other endeavors. Indeed, one testified that payment of circulators would permit him to spend more lucrative time in pursuit of his profession.

At the same time, the evidence did not indicate that plaintiffs were prevented in any way from espousing their cause simply because they could not obtain paid petition circulators. At best, the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers.

Thus, a threshold question is raised. Does the statute in question constitute a restraint upon the *plaintiffs'* right to free speech? Remembering that the right asserted here is the right to articulate a political belief to others in face-to-face confrontations over a petition for an initiated constitutional amendment, one must first ask whether the statute imposes a burden on that right.

In some of the cases relied upon by plaintiffs, it is apparently assumed that the burden exists. Yet, I question whether the individual right of any of the plaintiffs is affected by this statute. In order to cross the first threshold, one must find that plaintiffs' rights to political elocution have been restricted because they cannot pay someone else to speak. As I understand the contention, it is not that plaintiffs desire to pay for the dissemination of their political position, as one would do in political advertising, but that they desire to pay someone else to speak upon a subject which plaintiffs support. Thus viewed, the question arises as to whose rights of speech are involved. Can plaintiffs claim their rights to free speech have been invaded because someone else cannot be paid to speak? Does the statute in question suppress communications? Is this situation akin to the restriction of campaign contributions upheld by the court in *Buckley v. Valeo, supra?*

In *Buckley,* the court contrasted the first amendment ramifications of limitations on political contributions to those on political expenditures. The court noted in present society the expenditure of money is a necessary ingredient in effective political speech; therefore, any restriction on expenditures resulting in a suppression of political speech was in conflict with the first amendment. Hence, the effort to restrict the amount one could spend on a political campaign had to result in an unconstitutional restriction on protected communication.

In contrast, the court found a limitation on contributions to political campaigns was not constitutionally abhorrent. Because any contribution is nothing more than a generalized expression of support for a candidate or a view, the court concluded a contribution was not the same as a communication of political thought; hence contributions could be restricted.

Here we must remember, the advocates of the plaintiffs' proposed constitutional amendment are not restricted in the personal communication of their belief in the proposition in any way but arguably by Colo. Rev. Stat. § 1-40-110. Indeed, their ability to spend money on every other form of thought-dissemination is totally unfettered. While they have testified they would *prefer* to be able to spend money to hire circulators rather than to buy advertising, the test of constitutionality does not lie in their preferences. One must ask whether their personal rights of speech are transgressed by a restriction which only limits their ability to pay someone else to speak. Within the limited framework of this case, I believe the answer is no.

In light of the unlimited possibilities plaintiffs have to publicize their belief in their proposed measure, I am persuaded the statute in question is not a burden on their first amendment right. It seems to me, the limitation imposed by Colo. Rev. Stat. § 1-40-110 restricts only a generalized support for a political thought, much like the contribution of money was regarded in *Buckley, supra.* Thus, when the statute is placed in this perspective, it does not appear constitutionally onerous.

Yet, assuming for the sake of argument that this statute in some way could affect the plaintiffs' personal rights to politica... speech, have they shown the existence of such an effect? I conclude they have not. The evidence submitted by the plaintiffs consisted principally in their assertion the payment of petition circulators would facilitate the circulation of petitions. As previously indicated, they did not establish any adverse effect upon *their* ability to communicate arising out of the statute.

By contrast, the defendants have proved some provocative historical data from Colorado. This data shows advocates of initiated measures in this state have as much success in getting ballot position for their measures as do citizens in states in which petition circulators can be paid. (*See* defendants' ex. E.) Statistical data from the District of Columbia and the 23 states whose laws permit the initiative process indicate that since the process was adopted in Colorado in 1910, this state ranks fourth in the total number of initiatives placed upon the ballot. This is so despite the fact that 20 other states and the District of Columbia permit the payment of petition circulators. The evidence also establishes that Colorado's requirements for placing

initiated measures upon the ballot are about the least restrictive of any state. These facts tell me the prohibition against payment of circulators is in reality no inhibition.

Finally, in light of this data, we must consider whether the state interest to be achieved by the statute is sufficiently compelling to withstand a first amendment attack. The defendants' evidence indicates the initiative process got its start in the west as a "grassroots" means of protecting citizens from overpowering special interest groups whose financial strength was used to manipulate state legislators. Through initiated legislation, citizens were able to enact measures for the benefit of the populace as a whole. Indeed, this form of government has assumed an almost sacrosanct position in the role of individual rights in many states.[1] Therefore, Colorado asserts a compelling interest in protecting the integrity of the process and in insuring any initiated measure has a sufficiently broad base on support to assure its validity for public consideration.[2]

While plaintiffs' thrust at the question of state interest is aimed at the potential for illegal acts upon the part of paid circulators, that does not seem to be of significant concern to defendants. Indeed, the state has not suggested paid circulators would be persuaded to violate the law simply because they were paid. Its articulated concern is

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1 For a more detailed exposition of the right of initiative in Colorado, see *Colorado Project-Common Cause v. Anderson,* 178 Colo. 1, 495 P.2d 220.

2 Plaintiffs have asserted the compelling interest of the state is in preventing fraud in the process, but that is not the state's position at all.

that people may be persuaded to sign petitions for reasons other than the political validity of the cause espoused.

In line with that concern, plaintiff Grant has supplied some substance. He indicated during the course of his testimony how difficult it was to obtain petition signatures. In his experience, he was often unable to get people to listen long enough for him to communicate the benefits of the proposed constitutional amendment. Yet, on one occasion, he found that people were more willing to sign his petition because it was his birthday than they were to sign because they believed in the importance of his cause. He also indicated that in his experience in the state of Florida, a place where circulators can be paid, he encountered circulators of a petition he supported who padded the petitions with names taken from the telephone book. While he stated those petitions were not submitted when the padding was discovered, I would nonetheless assume the circulators were motivated to this endeavor by the money they received for each signature obtained.

This testimony leads directly to the state's purpose of protecting the integrity of the process. The evidence has established under Colorado law, all petition signatures have presumed validity, and no effort is made, as in most states, to independently verify the validity of signatures except upon the filing of written objections. Thus, in order to retain the facility with which initiated measures are qualified for the ballot and to protect the validity of petitions, Colorado does have an interest in eliminating a temptation to pad petitions which transcends the remedy of making such padding a criminal offense.

As I presently view the situation, the elimination of the temptation to pad is an exchange for the presumption of validity which attaches to petitions. Any change in one would have to have an effect upon the other. Thus, I do not believe the existence of a criminal sanction against subscribing false signatures to a petition is an equivalent and less onerous response to the padding of petitions than the device of eliminating the temptation to do so.

While it is of perhaps less significance, it cannot be gainsaid that the testimony of Mr. Grant lends credence to the state's contention paid circulators, who are really sales persons paid on the basis of results, would be persuaded to use techniques of salesmanship which are not inherently illegal just to enhance their own compensation. Indeed, if persons were persuaded to sign Mr. Grant's petition simply because it was his birthday, it takes only a minor stretch of the imagination to conjure possibilities of circulators obtaining signatures because of any other persuasive tactic resulting from the fertile mind of an expert salesman.

In short, I take seriously the state's argument it has an interest in protecting the integrity of the initiative process. I look upon the other expressed state interest in like manner.

The state's evidence of the history and limitations of the initiative process lends ample credence to its assertion that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. The state's expert pointed out the process of initiative is more rigid in practice than the process of qualifying a candidate for the ballot by petition. That is,

an initiated measure is drafted, submitted to state officers for review, comment, and selection of a ballot title, and then presented to the public. Thereafter, the measure cannot be changed in any way. Thus, the electorate is put to the difficult test of whether the measure in its submitted form should be cast into the stone of the constitution or laws of the state. The difficulty arises from the fact that unlike the legislative process existing in the General Assembly, where the process of debate can readily point out mistakes in draftsmanship or concept and where those mistakes can be easily changed, the legislative process of initiative is rigid, and no alterations can be accomplished. Thus, the state has an interest in seeing that any measure has significant support to insure only the better reasoned and drafted measures are given the chance of adoption. *See Citizens Against Legalized Gambling v. District of Columbia Board of Elections and Ethics*, 501 F. Supp. 786 (D.C. 1980).

The rigidity of the initiative process makes it a significantly different process from that employed in placing individual candidates on the ballot for consideration by the electorate. For that reason, I wish to be clearly understood that my conclusion in this case is restricted to the process of petition circulation of initiated measures. Whether the same state interests exist, or whether the same first amendment considerations apply to the payment of circulators of petitions for candidates, is a matter I have not considered, yet it is one which must not be confused with the matter before me now.

One final consideration should be made. Plaintiffs have relied in part upon *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983). That case is clearly inapposite, but it does

point out another distinction which must be drawn. Even though *Urevich* pertains to the same statute before me in this case, its result is predicated upon the right of initiative found in the Colorado constitution, and not the first amendment. As previously noted, Colorado regards the right of initiative as the "most important right reserved to [the electors] by the constitution." *Colorado Project-Common Cause v. Anderson*, 495 P.2d at 221. Thus, whether, Colo. Rev. Stat. § 1-40-110 would meet the test of Colo. Const., art. II, § 1, were it to be considered in a state court is a matter upon which I do not speculate.

On the basis of the foregoing, which shall constitute my findings and conclusions in this matter, it clearly appears to me plaintiffs have failed to demonstrate their entitlement to relief. Accordingly, it is

ORDERED judgment enter in favor of defendants and against plaintiffs. Defendants shall be awarded their costs upon the filing of a proper bill of costs within ten days of the entry of judgment.

DATED at Denver, Colorado, this 3rd day of July, 1984.

BY THE COURT:

/s/ John P. Moore, Judge
United States District Court

(Signature page of order in *Grant v. Meyer*, No. 84-JM-1207.)

ENTERED ON THE DOCKET
JULY 5, 1984

James P. Manspeaker
Clerk

By.....

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISES, INC., a Colorado corporation,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants.

JUDGMENT

(Filed July 5, 1984)

Pursuant to and in accordance with the order entered by The Honorable John P. Moore, United States District Judge, on July 3, 1984, it is

ORDERED that judgment is entered in favor of the defendants, Natalie Meyer and Duane Woodard, and against the plaintiffs, Paul K. Grant, Edward Hoskins, Nancy P. Bigbee, Lori A. Massie, Ralph R. Harrison and Coloradans for Free Enterprises, Inc.

FURTHER ORDERED defendants shall have their costs upon the filing of a bill of costs within ten days of the entry of this judgment.

FURTHER ORDERED the action is dismissed.

DATED at Denver, Colorado, this 5th day of July, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

/s/ By: Stephen P. Ehrlich
Chief Deputh (sic) Clerk

ENTERED
ON THE DOCKET

JULY 5 1984

BY JAMES P. MANSPEAKER
CLERK

By .....

I certify that I mailed a copy of the attached Order and Judgment to the following:

Dated: July 5, 1984

JAMES R. MANSPEAKER, CLERK

/s/ By N. Hatcher
Deputy Clerk

William C. Danks, Esq.
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No. 84-1949
Grant v. Meyer

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent.

I am impelled by recent and emphatic decisions of the Supreme Court to disagree with the majority opinion and the conclusions of the district court. To me, the clear meaning of the First Amendment decisions is that the imper-

atives of the Amendment on freedom of political communication, carried on in the modern day to an important extent by expenditures for publicity or contacts with the public, make any restriction on such communication highly suspect and subject to exacting scrutiny. In addition, the Supreme Court has recognized the special importance of protecting First Amendment rights with respect to *ballot measures*, like the Colorado initiative measure involved here. When examined with exacting scrutiny as the Court's decisions demand, the Colorado ban on compensation of solicitors for initiative measures fails, since all of the interests which the State suggests in defense of this restriction on communication are or can be protected by less instrusive measures.

I

On its own motion, this court requested that the parties address the question whether there should be abstention by the federal courts in this case, or a refusal to afford injunctive relief, because of the criminal sanctions in the Colorado statute banning the payment of initiative petition solicitors. In opposing an injunction pending appeal, the State's memorandum cited *Younger v. Harris*, 401 U.S. 37 (1971), *inter alia*, arguing that grounds for injunctive relief against enforcement of the State criminal statute were not demonstrated. The plaintiffs now are not pressing for injunctive relief, and have stated at argument that they are confident a declaratory judgment would be respected by the defendants. I am convinced that there is no impediment here to affording declaratory relief to protect these plaintiffs' rights under the First and Fourteenth Amendments.

There is no showing here of any pending proceeding in the State courts involving the merits of plaintiffs' constitu-

tional claim.[1] As noted, the plaintiffs now are seeking only declaratory relief to adjudge the Colorado statute invalid under the First and Fourteenth Amendments and the issue is ripe for determination.[2]

I am convinced that declaratory relief is appropriate in these circumstances. Plaintiffs Grant and Hoskins are individuals who are designated representatives of the petition to initiate the proposed constitutional amendment and plaintiff Coloradans For Free Enterprise, Inc. is a corporation supporting the amendment. Additional plaintiffs are registered voters of Colorado and all the plaintiffs allege that they desire to pay persons for their time and labor in circulating the petitions. I R. 2; *see also* II R. 13, 36. The plaintiffs are therefore parties "against whom these criminal statutes directly operate . . . ." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). "Moreover, the State has not disavowed any intention of invoking the criminal penalty provision . . ." against these plaintiffs, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979),

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[1] We are advised by plaintiffs that "[s]ince the District Court decision, the Colorado Secretary of State has served notice of a hearing to determine whether there has been a violation by one of the Plaintiffs of the statute in question." Brief of Appellants 10. This is not, however, a pending state court proceeding in which the plaintiffs' constitutional claims are involved.

[2] Plaintiffs also request that this court extend the time period within which they must file their petition or, alternatively, that it order the Secretary of State to place this initiative measure on the November ballot. Brief of Appellants 11-12. This relief, however, was not sought before the district court and should not be considered for the first time on appeal. In addition to their prayer for injunctive and declaratory relief, costs and attorney's fees, there was a general prayer for relief, but we do not deem this sufficient to present a claim for the special relief of extending the time for circulation of the petitions or ordering the measure placed on the ballott (sic).

and the State here is vigorously upholding the statute in direct litigation with these plaintiffs. "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

I feel, therefore, that these plaintiffs have standing to seek declaratory relief to vindicate their constitutional claim under the First and Fourteenth Amendments and that the federal court should not abstain in these circumstances from entering a proper declaratory judgment on the constitutional claim. Indeed, in *Steffel v. Thompson*, 415 U.S. at 469, in determining that declaratory relief was proper in light of the principles in *Younger v. Harris*, and *Samuels v. Mackell*, 401 U.S. 66 (1971), the Court pointed out that in *Doe v. Bolton* the Court had "affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these [criminal abortion statutes] would be given effect by the state authorities." In *Doe v. Bolton*, 410 U.S. at 188, the Court held that physicians had standing to challenge the abortion statute "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Thus, the plaintiffs have standing to assert their constitutional claim, and this is a proper case in which a declaratory judgment should be granted.

II

My basic disagreement on the merits is that the Colorado statute infringes essential rights of political com-

munication protected by the First and Fourteenth Amendments as those rights are recognized in recent decisions of the Supreme Court. The statute applies restrictions that are impermissibly broad in seeking to promote the State's asserted interests.

The critical facts are not in dispute. The individual plaintiffs are registered voters in Colorado and two of them are designated representatives of a petition to initiate a proposed amendment to the Constitution of Colorado. Plaintiff Coloradans for Free Enterprise, Inc. is a corporation organized under state law which supports the proposed constitutional amendment. The proposed amendment provides basically for the removal of motor carriers from the jurisdiction of the State Public Utilities Commission.

In order for the initiative measure to be placed on the November 1984 ballot, the proponents must obtain signatures of 46,737 registered voters on petitions supporting the measure before August 6, 1984. Plaintiffs wish to pay persons for circulating the petitions, but are prohibited from doing so by Colo. Rev. Stat. § 1-40-110 (1980),[4] which

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[4] Colo. Rev. Stat. § 1-40-110, as enacted, provides:

> Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

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makes the payment to circulators of petitions a criminal offense.[5] Plaintiffs brought suit, claiming that the statute violates their rights to free speech and political association by limiting the pool of available petition circulators to those willing and financially able to contribute their time on a volunteer basis; this reduction in the available pool, they argued, serves to reduce significantly the ability of the initiative sponsors to communicate with the Colorado electorate, and thus substantially impedes the free flow of political ideas.

The district court rejected plaintiffs' claim, finding that the statute does not impose a burden on their right to free speech. The court stated that plaintiffs are not restricted in the personal communication of their belief in the proposition; that their ability to spend money on every other form of thought dissemination is totally unfettered; and that the statute only restricts generalized support for political thought, much as the contribution of money was regarded in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The court also "[took] seriously" the State's interests sought to be achieved by the statute—(1) protect-

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This statute has been challenged at least once since its enactment. In *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983), the Supreme Court of Colorado held that "the language of section 1-40-110 is too broad to survive strict scrutiny" with respect to the right of initiative under the Colorado Constitution and accordingly deleted the word "inducement" from the statute. *Id.* at 763-64. The court did not express any view on the propriety of the regulation of "consideration." *Id.* at 763.

[5] Violation of the statute is a class 5 felony, which is punishable by one to two years' imprisonment plus one year of parole as the "presumptive" range of penalties. Colo. Rev. Stat. § 18-1-105 (Cum. Supp. 1983).

ing the integrity of the initiative process, and (2) insuring a broad base of support for any initiated measure.

In discussing the first asserted state interest, the court found that the testimony lends credence to the State's contentions that paid circulators would be persuaded to use sales techniques, not inherently illegal, just to enhance their own compensation. The court also referred to testimony of an incident in Florida where circulators padded petitions with names taken from a telephone book, and cited evidence showing that no effort is made in Colorado to verify the validity of signatures except on the filing of written objections.

With respect to the second asserted state interest, the court pointed to evidence of the history and limitations of the initiative process as lending ample credence to the State's contention that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. Specifically, the court pointed out that the initiative process started in the West as a "grassroots" means of protecting citizens from overpowering special interest groups, and that this process is relatively rigid in practice, in that once the measure is submitted to State officers for review and presented to the public, it cannot be changed in any way.

On this basis, the trial court concluded that plaintiffs failed to demonstrate their entitlement to relief and entered judgment in favor of defendants.

III

I cannot agree that the evidence is sufficient to support the district court's finding that the Colorado statute does

not impose a burden on plaintiffs' right to free speech.[6] The record evidence shows without dispute that a petition circulator, in obtaining signatures to a petition, engages in the communication of political ideas. The circulator approaches a stranger, asks him if he is a registered voter, and, if the person is willing to listen, advances arguments why the petition should be placed on the ballot.[7] *See* II R.

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[6] The district court also improperly considered the availability of other channels of communication in its analysis. This factor only becomes relevant in measuring the reasonableness of time, place, and manner regulations. *See, e.g., Clark v. Community for Creative Non-Violence,* 52 U.S.L.W. 4986, 4987 (U.S. June 29, 1984). The statute's ban on the payment of circulators, however, which so directly and substantially restricts plaintiffs' right to political speech, cannot be fairly characterized in those terms. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U.S. 147, 163 (1939).

[7] Paul Grant, one of the plaintiffs, gave the following testimony based on his experience as a petition circulator:

> [T]he way that we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?"
>
> Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"
>
> If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.
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> (Continued on following page)

10-12, 43. This process of soliciting signatures is therefore closely intertwined with a discussion of the merits of the measure. *See Libertarian Party of Oregon v. Paulus,* Civ. No. 82-521FR, slip op. at 4 (D. Ore. Sept. 3, 1982); *Hardie v. Fong Eu,* 18 Cal. 3d 371, 556 P.2d 301, 303, 134 Cal. Rptr. 201 (1976), *cert. denied,* 430 U.S. 969 (1977); *cf. Secretary of State of Maryland v. Joseph H. Munson Co.,* 52 U.S.L.W. 4875, 4878-79 (U.S. June 26, 1984) (in *Village of Schaumburg v. Citizens For Better a Environment,* 444 U.S. 620 (1980) (sic), Court determined that charitable solicitations are so intertwined with speech that they are entitled to protection of First Amendment).

The record also establishes that the available pool of petitioners will be less if they cannot be compensated for

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> Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign . . . .
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> . . . .
>
> [We] [t]ried to explain the not just deregulation in this industry, that it would free up the industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.
>
> We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

II R. 10-11

their work. The district court itself acknowledged that "the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." I R. 38; *see also Urevich v. Woodward*, 667 P.2d 760, 763 (Colo. 1983) ("We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."). The simple fact is that people must earn a living and only a limited number of individuals can afford to devote the substantial amounts of time that may be necessary to collect signatures on a purely volunteer basis.[8] Beyond that, there are limitations as a practical matter on the sponsors' ability to motivate volunteers because of the rejection that petitioning necessarily brings.[9]

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[8] Paul Grant testified:

> Money is very definitely a motivating factor to get someone to work on behalf of an effort, a matter of raising the demand and you get more supply. You pay people. You pay them more. You get more people able and willing to do it. Many of the people that I work with in the Coloradans for Free Enterprise, most of them—well, the majority of the people I work with in the Libertarian Party are people who have jobs, and they either have jobs or don't have jobs. If they do have jobs, they can't afford to take time off to work on the drive. If they don't have jobs, and they are looking for them, they can't afford to be volunteers. So money either enables people to forego leaving a job, or enables them to have a job.

II R. 19-20.

[9] Lori Massie, director of recruitment for the ballot drive, testified:

> A petition circulator can very easily be motivated by money. If he knows he can collect money for his efforts, he is far more likely to spend six hours a day

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Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to convey their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. *See Libertarian Party of Oregon v. Paulus*, slip op. at 4. In short, like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a direct quantity restriction on political speech—a restriction which "necessarily reduces the quantity of expression . . . ." *Buckley*, 424 U.S. at 19.

In light of these restrictions on communication, it is incumbent on the State to show that the governmental interests advanced in its support satisfy the "exacting scrutiny" applicable to limitations on core First Amendment rights of political expression. *See Buckley*, 424 U.S. at 44-45, 47-48. I cannot agree that any such showing has been made here.

First, I cannot accept the district court's initial rationale for upholding the ban on payment of petition circulators —*i.e.*, protection of the integrity of the initiative process. Although the State has every right to take strong measures to prevent overreaching, improper offers of consideration

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> at it, than he would otherwise. The way it is right now, it is kind of a painful process to go out there and stand and ask people to sign something, and after an hour of being beaten over the head with "no's" or "drop dead" or whatever, if they were being paid and they knew that their success would relate to their pay, they would work on it. They would probably polish up their techniques also.

II R. 34.

for signatures, fraudulent signatures and other fraudulent or dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems, within clearly recognized areas permitted by the Supreme Court. This is borne out fully by the teachings of the Court's recent opinions. Solicitation of signatures for the ballot measure ". . . is not so inherently conducive to fraud and overreaching as to justify its prohibition." *Village of Schaumberg v. Citizens For a Better Environment,* 444 U.S. 620, 637-38 n.11 (1980). The broad intrusion banning the use of paid circulators entirely is not tailored to the least intrusive remedy, as the Court's opinions demand. This statute, which so broadly bans communication by paid solicitors, cannot stand under the Supreme Court's recent First Amendment decisions. Moreover, those decisions afford special protection to free and open communication in support of *ballot measures.* The Court has pointed out that improper influences resulting from contributions and expenditures for *candidates* are a danger of a greater magnitude than those made in support of particular issues or ballot measures.

The district court likened the Colorado statute to a restriction on contributions, one not unconstitutionally onerous under *Buckley.* I R. 40. I cannot agree with this classification because it is the plaintiffs' expenditures to pay circulators of plaintiffs' own specific ballot measure, which are banned. Thus, the plaintiffs' payments to the circulators are not an expression resting "solely on the undifferentiated, symbolic act of contributing." *Buckley,* 424 U.S. at 21. However, even if we assume that the statute could correctly be classified as a ban on contributions, it cannot stand. The Court's recent focus on the protection of

efforts in support of ballot measures—whether by contributions or expenditures—makes this plain.

In *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California,* 454 U.S. 290 (1981), the Court invalidated a city ordinance that limited contributions to committees formed to support or oppose ballot measures. Distinguishing its holding in *Buckley* which sustained limitations on political contributions to a candidate, the Court stated that:

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . . .
>
> . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*

Berkeley, 454 U.S. at 296-97 (emphasis in original).

In discussing the ordinance's impermissible restraint on the freedom of expression, the Court noted that by limiting contributions the ordinance "automatically affects expenditures" and that "limits on expenditures operate as a direct restraint on freedom of expression" of groups engaging in ballot measure campaigns. *Id.* at 299. Distinguising candidate and ballot measure campaigns, the Court emphatically concluded that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.* The Court reasoned that the integrity of the political system would be adequately protected by alterrative means such as public disclosure or the outlawing of anonymous contributions. *Id.* at 299-300.

The distinction between the State's interest in regulating the campaigns of candidates and regulating campaigns for ballot measures was also discussed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1976). There the Court struck down a state criminal statute prohibiting corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." As noted by the Ninth Circuit in *C & C Plywood Corp. v. Hanson,* 583 F.2d 421, 424-25 (9th Cir. 1978), *Bellotti* made no distinction between contributions and expenditures in deciding that the statute was unconstitutional, but did, however, draw a clear distinction between ballot issues and partisan elections. The Court observed that:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." . . . We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."

Bellotti, 435 U.S. at 790-91 (footnotes and citations omitted); *see also Let's Help Florida v. McCrary,* 621 F.2d at 197, 199-201 (invalidating Florida statute that restricted size of contributions to any political committee in support

of, or opposition to, ballot issues); *C & C Plywood Corp. v. Hanson,* 583 F.2d at 424-25 (invalidating Montana law that prohibited corporations from making contributions in support of, or opposition to, ballot issues); *Schwartz v. Romnes,* 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute that prohibited corporate contributions for political purposes must be construed narrowly under First Amendment so that corporations may contribute to referendum campaign).

Although the State strenuously argues that it is not asserting a concern about fraud, it seems clear that the State has been compelled to attempt to avoid the Supreme Court's rejection in *Buckley* of the rationale of preventing fraud. In *Buckley* the Court held that the prevention of corruption did not constitute an interest sufficiently substantial to warrant the direct infringement of political communication represented by campaign expenditure limitations; that concern could be addressed by other measures. 424 U.S. at 45, 55-56; *cf. Secretary of State of Maryland v. Joseph H. Munson Co.,* 52 U.S.L.W. at 4881 n.16 (concerns about unscrupulous professional fundraisers or about fraudulent charities not a sufficient state interest to justify prohibiting charitable organizations, in connection with fundraising activities, from paying expenses of more than 25% of amount raised; such concerns could be accommodated directly through disclosures and registration requirements and penalties for fraudulent conduct).

The state fails to make any substantial argument that the Colorado General Assembly cannot effectively protect the integrity of the initiative process by laws more narrowly tailored to specific abuses. Colorado has existing statutes that make it unlawful to forge a signature on a pe-

tition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo. Rev. Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition (see Appendix hereto), and that circulators attach an affidavit attesting *inter alia* to the validity of the petitioner's signatures. *See id.* § 1-40-106 (Cum. Supp. 1983); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide for elaborate protest procedures for challenging the sufficiency of any petition, permitting both an administrative determination and an opportunity for judicial review.[10] *See* Colo. Rev. Stat. § 1-40-109 (Cum. Supp. 1983).

The State suggests that paid petition circulators may be too persuasive, or use irrelevant arguments, in convincing persons to sign the petitions. It suffices to say that the relative merits of the method of presentation and of the ballot measure itself are for the public to weigh and consider. The First Amendment is a value-free provision whose protection is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very purpose of the First Amendment is to foreclose

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[10] For examples of judicial review of ballot measures in Colorado and other jurisdictions, see *Billings v. Buchanan*, 192 Colo. 32, 555 P.2d 176, 176-79 (1976); *Case v. Morrison*, 118 Colo. 517, 197 P.2d 621, 621-24 (1948); *Haraway v. Armstrong*, 95 Colo. 398, 36 P.2d 456, 457-58 (1934); *Miller v. Armstrong*, 84 Colo. 416, 270 P. 877, 878-79 (1928); *Oklahomans for Modern Alcoholic Beverage Controls v. Shelton*, 501 P.2d 1089, 1091-95 (Okla. 1972); *In re Referendum Petition No. 18 State Question No. 437*, 417 P.2d 295, 296-98 (Okla. 1966); *Community Gas & Service Co. v. Walbaum*, 404 P.2d 1014, 1015-17 (Okla. 1965).

public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Second, I also cannot accept the State's defense of the statute based on its assertion of a "compelling" interest in requiring that an initiative have a wide base of public support before an initiative is placed on the ballot. This argument ignores the requirement in Colo. Rev. Stat. § 1-40-105 (Cum. Supp. 1983) that a petition be signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of Secretary of State at the previous general election. Such requirement for petition signatures, which in this case calls for a minimum of 46,737 signatures of registered voters, protects the State's interest in requiring a broad base of popular support. Further, as noted above, the validity of the required number of signatures can be reviewed in administrative and judicial proceedings questioning the signatures.

IV

I am particularly persuaded by the anlysis of other courts which have struck down similar restrictions on the payment of petition circulators as invalid under the First and Fourteenth Amendments.

It is true that in *State v. Conifer Enterprises, Inc.*, 82 Wash. 2d 94, 508 P.2d 149 (1973), the Washington Supreme Court held that a Washington statute prohibiting payment of petition circulators did not violate the First Amend-

ment. However, that case was decided before *Buckley* and was based on the Washington court's finding that while the solicitation of signatures on an initiative petition is political expression protected by the First Amendment, there is no necessary relationship between the payment of circulators and the exercise of that right. 508 P.2d at 153. *Buckley* rejected this theory, stating that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." 424 U.S. at 19 (footnote omitted).

In *Libertarian Party of Oregon v. Paulus*, Civ. No. 82-521FR (D. Ore. Sept. 3, 1982), the federal district court invalidated an Oregon statute prohibiting payment to petition circulators as violating the plaintiffs' First Amendment rights, relying primarily on *Buckley*. The court held that the statute restricted political speech because obtaining signatures on a nominating petition required the circulator to explain the candidate's views on political issues. The court pointed out that fewer people would undertake the task of circulating petitions if they could not be paid, and that the restraint was not necessary to advance a compelling state interest in preventing fraud, intimidation, or corruption. The court stated that the statute was really an indirect means of dealing with such problems and that the Legislature could deal with corruption in the circulation process by laws more narrowly aimed at specific abuses, as it had by imposing criminal penalties for forging

signatures and for misrepresentation during the circulation process. *Id.* at 4-5.

In *Hardie v. Fong Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976), *cert. denied*, 430 U.S. 969 (1977), the California Supreme Court similarly held that a statute limiting the amount that could be spent on the circulation of petitions was unconstitutional. The court relied on *Buckley* and particularly its recognition that virtually every means of political communication in modern society requires or involves the expenditure of money. 556 P.2d at 303. The court stated that "the process of solicitation of [petition] signatures, of necessity, involves the discussion of the merits of the measure. The circulators themselves thus become unavoidably a principal means of advocacy of the proposal." *Id.* The court concluded that there remained a demonstrable potential for serious infringement on the right to political communication guaranteed by the First Amendment. Further, the limitations imposed by the statute were not justified by a "compelling" state interest in preventing corruption or in assuring that positions on the ballot could not be bought; corruption could be dealt with effectively by laws more narrowly aimed at specific abuses. *Id.* at 304.

Thus, in the only two post-*Buckley* cases dealing with the restrictions similar to one before us, the courts have struck down the restrictions as violative of the First and Fourteenth Amendments.

V

In sum, I conclude that Colo. Rev. Stat. § 1-40-110 invalidly imposes a direct and substantial restriction on plaintiffs' right to political speech, employing unneces-

sarily broad prohibitions. In the area of free expression, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button,* 371 U.S. at 438. Therefore, I would hold that the Colorado statute violates the First and Fourteenth Amendments, and would grant declaratory relief to these plaintiffs.

APPENDIX

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

PETITION TO INITIATE

TO: The Honorable Natalie Meyer, Secretary of the State of Colorado.

We, the undersigned, registered electors of the State of Colorado respectfully order and demand that: The following proposed Amendment to the Constitution of the State of Colorado shall be submitted to the voters for their adoption or rejection at the polls at the next general election to be held on Tuesday, November 6, 1984, and each of the signers also states:

I sign this petition in my own proper person only, and I am a registered elector of the State of Colorado: My residence address and the date of signing this petition are correctly written after my name and I designate the following persons to represent me in all matters affecting this petition.

Paul Grant, 6541 Kilimanjaro, Evergreen, Colorado 80439

Brian Erickson, 2685 South Dayton Way, #262, Denver, Colorado 80231

Edward Hoskins, 150 South Clarkson Street, #308, Denver, Colorado 80209

The *title* to the proposed initiative to the Constitution petitioned for herein, as designated by the Secretary of State, Attorney General, and Director of the Legislative Drafting Office, (hereafter to be referred to as the Board) is as follows, to wit:

AN AMENDMENT TO ARTICLE XXV OF THE COLORADO CONSTITUTION PROHIBITING REGULATION, AS PUBLIC UTILITIES, OF PERSONS AND BUSINESSES WHICH TRANSPORT PEOPLE OR PROPERTY FOR COMPENSATION.

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

The proposed initiated AMENDMENT TO THE CONSTITUTION OF THE STATE OF COLORADO is as follows:

Be It Enacted by the People of the State of Colorado: Article XXV of the Constitution of the State of Colorado is amended by the addition of a sentence to the end of the first paragraph to read:

"Effective January 1, 1985, no person, corporation, or other legally recognized business entity engaged in the transportation of persons or property for compensation, shall be defined as public utilities, nor shall they be regulated as such."

The *summary* to the proposed initiative as designated by the Board is as follows:

Effective January 1, 1985, no one engaged in transporting persons or property for compensation would be defined or regulated as a public utility.

In the 1985-86 fiscal year, it is estimated that the measure would reduce state expenditures by approximately $2,000,000.00 and would reduce state revenues by approximately $1,500,000.00.

The *ballot title and submission clause* as designated and fixed by the Board is:

SHALL THERE BE AN AMENDMENT TO ARTICLE XXV OF THE COLORADO CONSTITUTION TO PROHIBIT REGULATION, AS PUBLIC UTILITIES, OF PERSONS AND BUSINESSES WHICH TRANSPORT PEOPLE OR PROPERTY FOR COMPENSATION?

YES ☐ NO ☐

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

Printed Name of Elector	Signature of Elector	Street and Number	City or Town County	Date Signed
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	

AFFIDAVIT OF CIRCULATOR
STATE OF COLORADO
COUNTY OF ——————

I, being first duly sworn, depose and say; I am a registered elector of the State of Colorado and my address is .....

I have circulated the foregoing petition and each signature thereon was affixed in my presence; and each signature thereon is the signature of the person whose name it purports to be, and to the best of my knowledge and belief each of the persons signing said petition was at the time of such signing a qualified elector of the State of Colorado; I have neither received nor have I entered into any contract whereby I will in the future receive any money or other thing of value in consideration of or as an inducement to the circulation of the above petition by me; I have not nor will I pay in the future and I believe that no other person has so paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of in-

ducing or causing such signer to affix his signature to such petition.

.....

(Signature of Circulator)

Subscribed and sworn to before me in the county of ....., state of Colorado, this ..... day of ....., 19.....

My commission expires .....

.....

Notary Public Address

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM—September 2, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable James E. Barrett, Honoable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, and Honorable Bobby R. Baldock, Circuit Judges.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADANS FOR FREE ENTERPRISES, INC., Plaintiffs-Appellants, v. NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General, Defendants-Appellees.	JUDGMENT No. 84-1949 (D.C. # 84-JM-1207)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded

to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

/s/ ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, et al., Plaintiffs,	)	NO. 84-1949
	)	D.C. # 84-JM-1207
	)	RECEIPT FOR
v.	)	MANDATE
	)	
NATALIE MEYER, etc., et al., Defendants.	)	(Filed September 28, 1987)

Received from Robert L. Hoecker, Clerk, and filed upon receipt, the mandate of the United States Court of Appeals in the above case, directed to Mr. James R. Manspeaker, Clerk, U.S.D.C. for the D. of Colorado.

DATED: 9/28/87 /s/ Gail Callaghan, Deputy

Please Date, Sign and Return to:

Clerk's Office
U.S. Court of Appeals, 10th Circuit
C-404 United States Courthouse
Denver, Colorado 80294

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,	)	
Plaintiffs-Appellants,	)	No. 84-1949
v.	)	
NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,	)	
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 6, 1987)

NOTICE IS HEREBY GIVEN that Natalie Meyer and Duane Woodard, the Defendants-Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on September 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 866-5385

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties herein by placing a correct copy of same in the United States mail, postage prepaid, at Denver, Colorado, this 5th day of October, 1987, addressed as follows:

William C. Danks, Esq.
620 Steele Park Bldg.
50 S. Steele Street
Denver, Colorado 80209

/s/ Ann M. Aragon

Subscribed and sworn to before me this 5th day of October, 1987. My Commission expires: June 4, 1991

/s/ Prestine Mickens
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,

Plaintiffs-Appellants,

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,

Defendants-Appellees.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 23, 1987)

NOTICE IS HEREBY GIVEN that Natalie Meyer and Duane Woodard, the Defendants-Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on September 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ TIMOTHY ARNOLD, #03417
MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 866-5385
AG Alpha No: ST EL HBEPQ

AFFIDAVIT OF SERVICE

This is to certify that I have served the foregoing AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties herein by placing a correct copy of same in the United States mail, postage prepaid, at Denver, Colorado, this 23rd day of October, 1987, addressed as follows:

William C. Danks, Esq.
3033 E. 1st Ave., #303
Denver, Colorado 80206

/s/ Maurice Knaizer

Subscribed and sworn to before me this 23rd day of October, 1987. My Commission expires: June 4, 1991

/s/ Prestine Mickins
NOTARY PUBLIC
13602 E. Dakota Pl.
Aurora, CO 80012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84 F 1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH A. HARRISON, COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,

Plaintiffs-Appellants

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 23, 1987)

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This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ TIMOTHY ARNOLD, #03417
MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
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Telephone: 866-5385
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William C. Danks, Esq.
3033 E. 1st Ave., #303
Denver, Colorado 80206

/s/ Maurice Knaizer

Subscribed and sworn to before me this 23rd day of October, 1987. My Commission expires: June 4, 1991.

/s/ Prestine Mickins
NOTARY PUBLIC
13602 E. Dakota Pl.
Aurora, CO 80012